Supreme Court, U.S.
FILED
APR 14 1994
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No. 93-723

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly held that 18 U.S.C. 2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that the materials at issue depicted minors engaging in sexually explicit acts.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Summary of argument	9
Argument:	
I. The court of appeals erred in holding 18 U.S.C. 2252 unconstitutional on the ground that it does not require the government to prove that the defendant knew that the materials depicted minors engaging in sexually explicit acts	11
A. Federal criminal statutes ordinarily are presumed to require scienter	12
B. The text of 18 U.S.C. 2252 provides no clear indication that Congress intended to create a strict-liability offense	17
C. The legislative history of 18 U.S.C. 2252 affirmatively indicates that Congress did not intend to dispense with a *mens rea* requirement	21
D. 18 U.S.C. 2252 should be construed to require knowledge that the production of particular materials involved the use of a minor engaging in sexually explicit conduct	39
II. Respondents' convictions should be affirmed because the trial court found that they had knowledge that the person depicted in the films was a minor	45
Conclusion	46
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Cheek v. *United States*, 498 U.S. 192 (1991)	14, 40

Cases—Continued: Page

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) 11
Hamling v. *United States*, 418 U.S. 87 (1974) 7, 15, 43
Liparota v. *United States*, 471 U.S. 419 (1985) 10, 13, 14, 15, 16, 17, 19, 20, 42
Mallette v. *Scully*, 752 F.2d 26 (2d Cir. 1984) 40
Miller v. *California*, 413 U.S. 15 (1973) 19
Morissette v. *United States*, 342 U.S. 246 (1952) 13, 14, 20
New York v. *Ferber*, 458 U.S. 747 (1982) 7, 19, 34, 35, 43
Osborne v. *Ohio*, 495 U.S. 103 (1990) 7, 8, 45
Payne v. *Tennessee*, 111 S. Ct. 2597 (1991) 16
Public Citizen v. *United States Department of Justice*, 491 U.S. 440 (1989) 11, 45
Rewis v. *United States*, 401 U.S. 808 (1971) 13
Rosen v. *United States*, 161 U.S. 29 (1896) 15
Smith v. *California*, 361 U.S. 147 (1959) 7, 14, 15, 41
United States v. *Bailey*, 444 U.S. 394 (1980) 13, 42
United States v. *Beck*, 615 F.2d 441 (7th Cir. 1980) 40
United States v. *Brown*, 862 F.2d 1033 (3d Cir. 1988) ... 12
United States v. *Burns*, 683 F.2d 1056 (7th Cir. 1982), cert. denied, 459 U.S. 1173 (1983) 41
United States v. *Cochran*, No. 93-1578 (3d Cir. Feb. 2, 1994) 12
United States v. *Colavito*, No. 93-1552 (2d Cir. Jan. 24, as amended and published Mar. 10, 1994) 12
United States v. *Duncan*, 896 F.2d 271 (7th Cir. 1990) .. 12
United States v. *Falu*, 776 F.2d 46 (2d Cir. 1985) 16, 17
United States v. *Feola*, 420 U.S. 671 (1975) 15, 16, 42
United States v. *Garot*, 801 F.2d 1241 (10th Cir. 1986) .. 12
United States v. *Gendron*, No. 92-2003 (1st Cir. Feb. 28, 1994) 12, 18, 21
United States v. *Gifford*, No. 93-1645 (1st Cir. Feb. 24, 1994) 12

Cases—Continued: Page

United States v. *Graham*, 739 F.2d 351 (8th Cir. 1984) . 41
United States v. *Holland*, 810 F.2d 1215 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987) 17
United States v. *Hudson*, 717 F.2d 1211 (8th Cir. 1983) .. 40
United States v. *International Minerals & Chemical Corp.*, 402 U.S. 558 (1971) 44
United States v. *Jewell*, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951 (1976) 41
United States v. *Lewin*, 900 F.2d 145 (8th Cir. 1990) 17
United States v. *Locke*, 471 U.S. 84 (1985) 11
United States v. *Marchant*, 803 F.2d 174 (5th Cir. 1986) 12
United States v. *Ocampo-Guarin*, 968 F.2d 1406 (1st Cir. 1992) 40
United States v. *Picciandra*, 788 F.2d 39 (1st Cir.), cert. denied, 479 U.S. 847 (1986) 41
United States v. *Pruitt*, 763 F.2d 1256 (11th Cir. 1985), cert. denied, 474 U.S. 1084 (1986) 17
United States v. *Thomas*, 893 F.2d 1066 (9th Cir.), cert. denied, 498 U.S. 826 (1990) 6, 17, 18
United States v. *United States District Court for Central District of California*, 858 F.2d 534 (9th Cir. 1988) 20, 21
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 13, 18, 19, 40, 41, 42

Constitution and statutes:

U.S. Const.:
Amend. I ..... *passim*
Amend. V (Due Process Clause) 6
Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205 34
Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204:
§§ 3-5, 98 Stat. 204-205 35
§ 4(3), 98 Stat. 204 35

Statutes—Continued:

	Page
Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. N, § 7511(b), 102 Stat. 4485	36
Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Tit. III, 104 Stat. 4816:	
§ 323(a), 104 Stat. 4818	2
§ 323(b), 104 Stat. 4819	2
Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, §§ 2-3, 100 Stat. 3510	36
Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (1978)	21
18 U.S.C. 2251	*passim*
18 U.S.C. 2252	*passim*
18 U.S.C. 2252(a)	2, 5, 31
18 U.S.C. 2252(a)(1)	2, 3, 5
18 U.S.C. 2252(a)(2)	2, 3, 5
18 U.S.C. 2252(a)(2) (Supp. IV 1992)	2
18 U.S.C. 2252(a)(3) (Supp. IV 1992)	2
18 U.S.C. 2252(a)(4) (Supp. IV 1992)	2
18 U.S.C. 2252(b)	2, 19
18 U.S.C. 2253	19
18 U.S.C. 2254	19
18 U.S.C. 2256	3, 8
18 U.S.C. 2256(1)	8
18 U.S.C. 2256(2)	42
18 U.S.C. 2256(2)(E)	8
18 U.S.C. 2257(b)	20
Sherman Act, 15 U.S.C. 1 *et seq.*	19
18 U.S.C. 111 (1970)	15, 42
18 U.S.C. 371	3
18 U.S.C. 1461	15, 25, 43
18 U.S.C. 1462	3, 25
18 U.S.C. 1465	25
18 U.S.C. 1962(c)	3
18 U.S.C. 1962(d)	3
21 U.S.C. 845a(a) (Supp. II 1984)	16
21 U.S.C. 860(a) (Supp. IV 1992)	16

Miscellaneous:

	Page
American Law Institute, *Model Penal Code & Commentaries* (1985)	41
William Branigin, *Manila in Agony Over Schindler's Ecstasy*, Wash. Post, Mar. 8, 1994	20
123 Cong. Rec. (1977):	
p. 30,926	29
p. 30,927	29
p. 30,935	29, 36-37
pp. 30,948-30,949	29
p. 33,047	27
p. 33,048	28
p. 33,050	28, 39
p. 33,057	28
pp. 33,060-33,061	28
p. 34,992	30
p. 34,997	30
pp. 35,024-35,025	30
p. 35,030	30
p. 35,032	31
pp. 35,033-35,034	30
p. 37,135	34
p. 37,136	33-34
124 Cong. Rec. (1978):	
p. 526	32
p. 528	34
p. 529	34
p. 531	34
p. 9306	34
129 Cong. Rec. (1983):	
p. 32,458	35
p. 32,459	35
p. 32,461	35
130 Cong. Rec. (1984):	
p. 7197	35
p. 7198	35
H.R. 6693, 95th Cong., 1st Sess. (1977)	29, 30, 34
H.R. 8059, 95th Cong., 1st Sess. (1977)	21, 29
H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. (1977)	20, 32, 33
H.R. Rep. No. 696, 95th Cong., 1st Sess. (1977)	20, 29, 30, 38

Miscellaneous—Continued: Page

H.R. Rep. No. 536, 98th Cong., 1st Sess. (1983) 35
H.R. Rep. No. 910, 99th Cong., 2d Sess. (1986) 36
Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 22, 23, 24, 25
S. 1011, 95th Cong., 1st Sess. (1977) 21, 22
S. 1585, 95th Cong., 1st Sess. (1977) 21
S. Conf. Rep. No. 601, 95th Cong., 1st Sess. (1977) 20, 32, 33
S. Rep. No. 438, 95th Cong., 1st Sess. (1977) ... 22, 23, 25, 26, 38
S. Rep. No. 169, 98th Cong., 1st Sess. (1983) 35
Sexual Exploitation of Children: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) 24, 25
14 Weekly Comp. Pres. Doc. 279 (Feb. 13, 1978) 34

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 982 F.2d 1285. The two opinions of the district court (Pet. App. 30a-36a, 37a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1992. A petition for rehearing was denied on July 9, 1993. Pet. App. 43a. On September 24, 1993, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 6, 1993. The petition was filed on November 5, 1993, and was granted on February 28, 1994. J.A. 382. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2252 (1988) provided as follows:[1]

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

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[1] In 1990, Section 2252(a) was amended by revising paragraph (2) in minor respects, and by adding new paragraphs (3) and (4), which prohibit the sale or possession of visual depictions or materials containing visual depictions, either where the conduct occurs in the special maritime or territorial jurisdiction of the United States or where the materials have been mailed or have been shipped or transported in interstate or foreign commerce. Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Tit. III, § 323(a) and (b), 104 Stat. 4818-4819. Section 2252, as so amended, is reproduced at App., *infra*, 3a-5a.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined nor more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

The other statutory provisions pertinent to this case—18 U.S.C. 2251 and 2256—are reproduced at App., *infra*, 1a-2a, 5a-6a.

STATEMENT

After a bench trial in the United States District Court for the Central District of California, respondents were convicted on one count of shipping child pornography, in violation of 18 U.S.C. 2252(a)(1); one count of distributing child pornography, in violation of 18 U.S.C. 2252(a)(2); and one count of conspiring to violate 18 U.S.C. 2252, in violation of 18 U.S.C. 371.[2] Respondent Gottesman was sentenced to 12 months' imprisonment on one count, and the sentences on the remaining two counts were suspended in favor of three years' probation. Respondent X-Citement Video, Inc., was fined $250,000 on each count, all but $100,000 of which was suspended. Pet. App. 2a; Def't C.A. Excerpt of Record (E.R.) 74-77. The court of appeals reversed, with one judge dissenting in part. Pet. App. 1a-29a.

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[2] The district court acquitted respondents on one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and six counts of using a common carrier to ship obscene material in interstate commerce, in violation of 18 U.S.C. 1462.

1. The evidence at trial showed that in June 1986, Los Angeles Police Officer Steven Takeshita and FBI Special Agent Nellie Magdaloyo, posing as pornography distributors, met with Gottesman at the business premises of X-Citement Video, which Gottesman owned. At the meeting, Gottesman agreed to ship videotapes showing adults engaging in sexually explicit conduct to the store in Hawaii that Takeshita supposedly owned and that Magdaloyo was said to manage. The next month, Takeshita returned to X-Citement Video and spoke with Gottesman, who mentioned that he was keeping some tapes at his residence because of the Traci Lords investigation. Newspaper articles appearing at that time reported that Lords had appeared in pornographic films while she was under age 18. Gov't C.A. Excerpts of Record (E.R.) 18-21, 27-28; J.A. 139-143.

Approximately six months later, Takeshita returned to X-Citement Video to purchase additional videotapes. During that visit, Gottesman offered to sell Takeshita the Traci Lords tapes. Gottesman instructed an employee, Steve Orenstein, to show Takeshita the tapes, but Orenstein declined, saying that he knew the tapes were illegal and that he did not want to get arrested. Gottesman then took Takeshita upstairs and showed him 49 tapes featuring Lords. Takeshita asked which films had been produced when Lords was 15, and Orenstein (who by that time had joined Gottesman and Takeshita) identified two of the tapes as being among Lords' earliest films. Gov't E.R. 34-40.

In discussing the purchase of the tapes, Gottesman said that he would accept only cash because he did not want to create any record of the transactions. He also declined to ship the tapes to Hawaii, noting that he was under federal investigation. Gottesman said that if

Takeshita were arrested, Gottesman would not acknowledge where the tapes had come from. Gov't E.R. 41-43.

When Takeshita arrived at X-Citement Video the next day to pick up the tapes, Gottesman recommended that Takeshita sell the tapes for $50 each. He warned Takeshita that any customer willing to pay more than $50 was probably a police officer. Gottesman stated that the government did not prosecute sales of child pornography in Hawaii and that it was therefore safe to sell the tapes in that State. Gottesman supplied Takeshita with 50 videotapes featuring Lords before her 18th birthday. That transaction formed the basis for the charge that respondents had distributed child pornography in violation of 18 U.S.C. 2252(a)(2). Gov't E.R. 48-52; J.A. 93.

When Takeshita returned to X-Citement Video on February 13, 1987, Gottesman informed him that 56 additional Traci Lords tapes were available for a total price of $1,000. Gottesman initially refused Takeshita's request that he ship the tapes to Hawaii, explaining that because Lords was a minor, the interstate shipment of the films would be unlawful. Approximately two months later, however, Gottesman agreed to ship the tapes to Hawaii. That transaction formed the basis for the charge that respondents had shipped child pornography in violation of 18 U.S.C. 2252(a)(1). Gov't E.R. 54-56; J.A. 94.

2. Following a bench trial, the district court found respondents guilty of violating 18 U.S.C. 2252(a). That provision states that any person who "(1) knowingly transports or ships * * * any visual depiction" or "(2) knowingly receives, or distributes, any visual depiction" shall be guilty of a felony, if "(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." The district court concluded that "the

statute does imply a scienter requirement; and that the Government was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age." Pet. App. 41a ¶2. In the court's view, "[i]t is axiomatic that to know the nature and character of child pornography, almost by definition, one must know that it depicts children." *Id.* at 41a ¶3. The court further found as fact that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." *Id.* at 39a ¶7.

While respondents' appeal was pending, the Ninth Circuit rendered its decision in *United States* v. *Thomas*, 893 F.2d 1066, cert. denied, 498 U.S. 826 (1990). The court in *Thomas* held that Section 2252 "does not require that [the defendant] knew that the pornography he transported, mailed, and received involved a minor. The section requires only that [the defendant] knowingly transported and received the material." 893 F.2d at 1070. The court in *Thomas* did not address the question whether Section 2252, as so construed, is constitutional. Respondents in the instant case requested and received a remand to the district court for reconsideration in light of *Thomas*. Pet. App. 2a-3a.

On remand, respondents argued that Section 2252, as construed in *Thomas*, violates the First Amendment and the Due Process Clause. In light of *Thomas*, the district court modified its prior conclusions of law, deleting its earlier conclusion that Section 2252 "implies a scienter requirement" and that the government "was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age." Pet. App. 35a; see *id.* at 41a ¶2. The court rejected respondents' constitutional claims, however, holding that Section 2252, as construed

in *Thomas*, "does not impermissibly chill the distribution of constitutionally protected material" and is "sufficiently specific and definite to give fair notice to potential offenders so as not to be deemed void for vagueness." Pet. App. 36a. The court explained that in its view "[t]he government met its burden under the statute when it proved that [respondent Gottesman] had knowledge of the 'character and contents' of the material and that Mr. Gottesman was not a mere delivery person with no idea whether the package contained books or widgets." *Id.* at 35a. The court did not retract its earlier factual finding that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." *Id.* at 39a ¶7.

3. The court of appeals reversed respondents' convictions. Pet. App. 1a-29a. The panel concluded that "*Thomas* is the only precedent from this circuit on the question of whether section 2252 requires scienter of the minority of the performers," and deemed itself "bound by [*Thomas*'s] conclusion that section 2252 contains no such requirement." Pet. App. 11a. Relying on this Court's decisions in *Smith* v. *California*, 361 U.S. 147 (1959); *New York* v. *Ferber*, 458 U.S. 747 (1982); *Osborne* v. *Ohio*, 495 U.S. 103 (1990); and *Hamling* v. *United States*, 418 U.S. 87 (1974), the court held that "the constitutional minimum requirement of scienter for the Act's proscription of transportation or receiving child pornography is knowledge that at least one of the performers is under age 18." Pet. App. 14a. In light of *Thomas*, the court declined to engraft a scienter requirement onto the statute in order to avoid holding it unconstitutional. *Id.* at 16a. Because Section 2252, as construed in *Thomas*, does not "require knowledge of the minority of the performers as an element of the crime it defines," the court held that

the statute is "unconstitutional on its face." Pet. App. 15a, 17a. Accordingly, the court reversed respondents' convictions.[3]

Judge Kozinski dissented in part. Although Judge Kozinski agreed that the word "knowingly" in Section 2252 "does not apply to the age of the depicted children," Pet. App. 23a, he believed that the court's duty was to save the statute from invalidation by reading into it a scienter requirement. *Id.* at 27a. Judge Kozinski noted that "[s]tatutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations." *Ibid.* He observed that under this Court's decision in *Osborne* v. *Ohio*, 495 U.S. at 115, a requirement of "recklessness" as to the minority of a model or performer is sufficient to satisfy constitutional concerns. Pet. App. 18a-19a, 23a, 27a n.8. Judge Kozinski found it "inconceivable that, given the choice between no statute at all and a statute that contains a requirement of recklessness, those involved in passing the child pornography statute would have chosen the former rather than the latter." *Id.* at 28a. Judge Kozinski would have reversed the convictions, however, because he believed that respondents had been tried on a strict-liability theory. *Id.* at 17a n.*.

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[3] Before holding Section 2252 unconstitutional on the ground that it lacks a scienter requirement, the court of appeals rejected respondents' arguments that the statute is unconstitutionally overbroad and vague because (a) "minor" is defined in 18 U.S.C. 2256(1) as a person under age 18; (b) Section 2256(2)(E) uses the word "lascivious" instead of "lewd"; and (c) Section 2256 does not define "bestiality" or "sadistic or masochistic abuse." Pet. App. 5a-8a.

SUMMARY OF ARGUMENT

I. A. This Court's precedents make clear that federal statutes should be construed so as to avoid constitutional difficulties unless such a construction is plainly contrary to congressional intent. The Ninth Circuit's decision therefore may be upheld only if Congress has unmistakably declined to impose a scienter requirement in prosecutions under 18 U.S.C. 2252. Congress has manifested no such intent. Rather, read in light of its legislative history and established tenets of statutory construction, Section 2252 is best understood to require proof that the defendant transported, shipped, distributed, or received material that he knew depicted minors engaging in sexually explicit acts.

B. With the exception of "regulatory" or "public welfare" offenses, criminal liability ordinarily requires knowledge of the facts that render one's conduct unlawful, and the absence of an express knowledge requirement in a particular statute does not imply that Congress intended to create a strict-liability offense. The question instead is whether Congress has given an *affirmative* indication of its intent to impose criminal liability on individuals who act without *mens rea*. The text of Section 2252 does not support this conclusion, and certain aspects of the statute—such as the severity of the penalties for violations, and the practical difficulties that would attend any effort by distributors or receivers to verify the ages of performers whose majority might be open to question—weigh against it.

C. Nor does the legislative history suggest that Congress intended to dispense with a scienter requirement. Analysis of that history is complicated by the fact that Section 2252, as first enacted in 1978, proscribed the distribution and receipt only of *obscene* materials.

Section 2252 thus operated as a sentencing enhancement provision, increasing the penalties for violations of existing laws when those violations involved the use of minors engaging in sexually explicit conduct; and this version of the statute might plausibly be read not to require knowledge of a performer's minority. There is, however, no suggestion in the legislative history of congressional intent to dispense with a knowledge requirement under the current statute, which makes the minority of the performer the fact that separates lawful from unlawful conduct. In fact, when such a provision was first proposed in 1977, its sponsor stated unambiguously that it would impose liability only upon persons who knew that the materials in question depicted minors engaging in sexually explicit conduct.

D. Two *amici* contend that Section 2252 requires knowledge of the contents of proscribed materials but not of the minority of the performers. We disagree. *Amici*'s view finds no support in the text of the statute: There is no grammatically plausible way in which the word "knowingly" can be thought to refer to "sexually explicit conduct" but not to the "use of a minor." Their reading is also inconsistent with the legislative history and with the "background assumption of our criminal law," *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), that imposition of criminal liability ordinarily requires knowledge of the fact that separates lawful from unlawful conduct. The statute, so construed, would also raise significant First Amendment concerns.

II. In the instant case respondents were not (as the dissenting judge in the court of appeals believed) tried and convicted on a strict-liability theory. Rather, the government proved, and the district court found, that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped

in interstate commerce." Pet. App. 39a ¶7. Respondents' convictions therefore should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING 18 U.S.C. 2252 UNCONSTITUTIONAL ON THE GROUND THAT IT DOES NOT REQUIRE THE GOVERNMENT TO PROVE THAT THE DEFENDANT KNEW THAT THE MATERIALS DEPICTED MINORS ENGAGING IN SEXUALLY EXPLICIT ACTS

The court of appeals held 18 U.S.C. 2252 unconstitutional on its face because, under circuit precedent, the statute does not require the government to prove that the defendant knew that the material he is charged with distributing depicted a mi[illegible] engaging in sexually explicit acts. This Court, however, has traditionally been "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 466 (1989). Accordingly, the federal courts are to "construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). See also *Public Citizen*, 491 U.S. at 465-466 (collecting cases); *United States* v. *Locke*, 471 U.S. 84, 96 (1985).

In this case, a construction of Section 2252 that would avoid the constitutional problem the Ninth Circuit identified would not be "plainly contrary to the intent of Congress." Indeed, read in light of established tenets of statutory construction and its legislative history (which manifests a sensitivity to First Amendment concerns),

Section 2252 is best understood to require proof that the defendant transported, shipped, distributed, or received material that he knew depicted minors[4] engaging in sexually explicit acts. Every other court of appeals to have considered the question has construed Section 2252 in that manner.[5]

A. Federal Criminal Statutes Ordinarily Are Presumed To Require Scienter

This Court has frequently recognized that "[c]riminal liability is normally based upon the concurrence of two

[4] Throughout this brief we use phrases such as "knowledge of a performer's minority" or "knowledge that a performer is a minor" to mean "knowledge that a performer is under 18 years of age." A person who knew that a particular performer was 17 years old, but mistakenly believed that a person of that age was not a "minor" within the meaning of the statute, would possess the requisite knowledge. The defendant's knowledge that a performer is under 18 may be proved by circumstantial as well as direct evidence. See note 29, *infra*.

[5] The Ninth Circuit stands alone in holding that Section 2252 imposes no scienter requirement regarding the minority of the model or performer. Prior to the Ninth Circuit's decision in the instant case, at least four circuits had concluded or assumed that Section 2252 does require proof of scienter. See *United States* v. *Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986); *United States* v. *Brown*, 862 F.2d 1033, 1036, 1038 n.6 (3d Cir. 1988); *United States* v. *Marchant*, 803 F.2d 174, 177 (5th Cir. 1986); *United States* v. *Duncan*, 896 F.2d 271, 278 (7th Cir. 1990). Moreover, three courts of appeals have since considered and expressly rejected the holding of the Ninth Circuit in the instant case. Those courts have held that Section 2252 imposes a scienter requirement and that the statute, so construed, is constitutional. See *United States* v. *Gendron*, No. 92-2003 (1st Cir. Feb. 28, 1994), slip op. 2-12; *United States* v. *Gifford*, No. 93-1645 (1st Cir. Feb. 24, 1994), slip op. 20-24; *United States* v. *Colavito*, No. 93-1552 (2d Cir. Jan. 24, 1994, amended and published Mar. 10, 1994), slip op. 2444-2447; *United States* v. *Cochran*, No. 93-1578 (3d Cir. Feb. 2, 1994).

factors, 'an evil-meaning mind [and] an evil-doing hand.'" *United States* v. *Bailey*, 444 U.S. 394, 402 (1980) (quoting *Morissette* v. *United States*, 342 U.S. 246, 251 (1952)). "[T]he failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law." *Liparota* v. *United States*, 471 U.S. 419, 426 (1985). In general, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978). "This Court, in keeping with the common-law tradition and with the general injunction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' * * * has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *Id.* at 437 (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)).[6]

This interpretive principle is qualified, however, in several significant respects. First, the Court in *Morissette* distinguished the offense at issue there from "public welfare offenses" that "do not fit neatly into any * * * accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals * * *, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." 342 U.S. at 255. The Court explained

[6] This "background assumption of our criminal law," *Liparota*, 471 U.S. at 426, applies even where it is not contended that a statute would be unconstitutional if construed to establish a strict-liability offense. *Id.* at 424 n.6; see also Pet. App. 27a (Kozinski, J., dissenting) ("Statutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations.").

that "such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.* at 260 (quoting *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1943)).[7] Given this Court's holdings that the First Amendment protects sexually explicit but non-obscene materials if they do not depict minors as performers or models, Section 2252 does not, in our view, fall into this category of "regulatory" or "public welfare" offenses for which scienter is ordinarily not required. See *Smith* v. *California*, 361 U.S. 147, 152 (1959).

Second, the requisite showing of *mens rea* generally need not include proof that the defendant understood the legal status of his actions (*i.e.*, knew his conduct to be unlawful). "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991).[8] Thus, although it is "a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen," *Liparota*, 471 U.S. at 425 n.9, "[i]t is not a defense to a charge of receipt of stolen goods that one did not know

[7] This category of "regulatory" or "public welfare" offenses is discussed in our brief in *Staples* v. *United States*, No. 92-1441 (argued Nov. 30, 1993). We have furnished counsel for respondents with a copy of our brief in *Staples*.

[8] The Court in *Cheek* held, however, that "Congress has * * * softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. * * * This special treatment of criminal tax offenses is largely due to the complexity of the tax laws." 498 U.S. at 200.

that such receipt was illegal." *Ibid.* The same rule applies in prosecutions involving communicative materials that are asserted to be protected by the First Amendment. To require awareness of illegality, the Court has recognized, "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Hamling* v. *United States*, 418 U.S. 87, 123 (1974).[9] See also *Rosen* v. *United States*, 161 U.S. 29, 41-42 (1896).

Third, once a defendant has been shown to have acted with criminal intent, factual circumstances of which he was unaware may properly be taken into account in establishing his guilt of a particular offense within federal jurisdiction and in assessing the appropriate level of punishment. In *United States* v. *Feola*, 420 U.S. 671 (1975), for example, the Court construed 18 U.S.C. 111 (1970). That statute provided that "[w]hoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [designated federal official] while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than

[9] In the context of obscenity prosecutions, this Court has held that a bookseller may not, consistent with the Constitution, be held criminally liable for the sale of obscene materials if he lacks knowledge of their contents. *Smith* v. *California*, 361 U.S. at 153. The defendant need not, however, be aware that the materials he sells or distributes are obscene. *Hamling*, 418 U.S. at 119-124. Rather, "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Id.* at 123. The Court in *Hamling* held that 18 U.S.C. 1461, which subjects to criminal penalties "[w]hoever knowingly uses the mails for the mailing" of obscene materials, requires proof that the defendant knew the character of the materials mailed but does not require proof that the defendant understood their "legal status." 418 U.S. at 119-121; see pages 43-44, *infra*.

three years, or both." The Court held that the statute could properly be applied to defendants who had assaulted undercover federal agents posing as narcotics buyers. The Court explained:

> This interpretation poses no risk of unfairness to defendants. It is no snare for the unsuspecting. Although the perpetrator of a narcotics "rip-off," such as the one involved here, may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful. The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him. The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.

420 U.S. at 685; accord *Liparota*, 471 U.S. at 431-432 & n.15; see also *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2605 (1991) ("two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm").[10]

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[10] In *United States* v. *Falu*, 776 F.2d 46 (2d Cir. 1985), the court of appeals reviewed the defendant's conviction under 21 U.S.C. 845a(a) (Supp. II 1984) (currently codified at 21 U.S.C. 860(a) (Supp. IV 1992)). That Section imposed increased criminal penalties for "[a]ny person who violates section 841(a)(1) of this title by distributing a controlled substance in or on, or within one thousand feet of, [school property]." Proof that the defendant knew of the school's proximity, the court held, was not necessary to establish a violation of Section 845a(a). The court explained:

> This construction of section 845a(a) does not criminalize otherwise innocent activity, since the statute incorporates section 841(a)(1), which already contains a *mens rea* requirement * * *. This distinguishes the schoolyard statute from the one involved in *Liparota*, where failure to impose a *mens rea* requirement would "criminalize a broad range of apparently innocent conduct." * * * Anyone who violates section 845a(a) knows that distribution of narcotics is illegal, although the violator may not know that the distribution occurred within 1,000 feet of a school. In this respect, the schoolyard statute resembles other federal criminal laws, which provide enhanced penalties or allow conviction for obviously antisocial conduct upon proof of a fact of which the defendant need not be aware. See, e.g., [*Feola, supra*].

776 F.2d at 50 (quoting *Liparota*, 471 U.S. at 426). Accord *United States* v. *Lewin*, 900 F.2d 145, 148 (8th Cir. 1990); *United States* v. *Holland*, 810 F.2d 1215, 1222-1224 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987). Cf. *United States* v. *Pruitt*, 763 F.2d 1256, 1261-1262 (11th Cir. 1985) (person may be convicted of "knowingly or intentionally" distributing controlled substance to a minor even if he is unaware that the person is a minor), cert. denied, 474 U.S. 1084 (1986).

B. The Text Of 18 U.S.C. 2252 Provides No Clear Indication That Congress Intended To Create A Strict-Liability Offense

In holding that 18 U.S.C. 2252 does not require knowledge that a minor is involved in sexually explicit conduct, the Ninth Circuit in *United States* v. *Thomas*, 893 F.2d 1066, cert. denied, 498 U.S. 826 (1990), reasoned as follows:

> In subsection 1, "knowingly" modifies only "transports or ships." In subsection 2, "knowingly" modifies only "receives." The section, therefore, does not require that [the defendant] knew that the

pornography he transported, mailed, and received involved a minor.

893 F.2d at 1070. That analysis is doubly flawed. First, as we discuss below (see pages 28, 36-37, *infra*), the legislative history affirmatively indicates that Congress intended the word "knowingly" in Section 2252 to refer to the minority of the performer as well as to the act of transporting, shipping, receiving, or distributing. Second, the Ninth Circuit's reasoning misperceives the nature of the inquiry in a case such as this. Even if the word "knowingly" did not appear in Section 2252 at all, it would not follow that Congress intended to create a strict-liability offense. See *United States* v. *United States Gypsum Co.*, 438 U.S. at 438 ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.").[11] Outside the context of a regulatory or public welfare offense, the question instead is whether Congress has given an affirmative indication of its intent to impose criminal liability on individuals who act without *mens rea*. The text of Section 2252 reflects no such design. Indeed, certain features of the statute point in the opposite direction.

1. In *United States* v. *United States Gypsum Co.*, *supra*, the Court noted that individuals convicted of Sherman Act violations faced possible prison sentences

[11] Accord *United States* v. *Gendron*, slip op. 6 ("when a criminal statute is totally silent about state of mind (as is commonly the case), courts nonetheless assume that Congress intended to require some kind of guilty knowledge with respect to major wrong-creating elements of major crimes"); *id.* at 7 ("had the word 'knowingly' not appeared at all in the child pornography statute, courts * * * would have insisted nonetheless that prosecutors prove a guilty state of mind in respect to the nature of the material").

of up to three years and fines of up to $100,000. The Court observed that "[t]he severity of these sanctions provides further support for our conclusion that the Sherman Act should not be construed as creating strict-liability crimes." 438 U.S. at 442 n.18. Violations of Section 2252 are punishable by up to *ten* years' imprisonment and are subject as well to fines and to criminal or civil forfeiture, with enhanced penalties for repeat offenders. 18 U.S.C. 2252(b), 2253, 2254. The severity of the applicable penalties counsels hesitation in construing this Section to impose liability without scienter.

2. "In most previous instances [where a criminal statute has been held to impose strict liability], Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota*, 471 U.S. at 433. It could hardly be contended, however, that the content of magazines or videotapes is generally "subject to stringent public regulation." To the contrary, such regulation is ordinarily proscribed by the First Amendment. Thus, so long as the materials at issue are not obscene, the minority of a single performer can be the difference between conduct that is proscribed by Section 2252 and conduct that is constitutionally protected.[12] It would

[12] Materials may be proscribed as obscene only if the work, taken as a whole, "appeals to the prurient interest" and "lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, 413 U.S. 15, 24 (1973). The applicability of Section 2252, by contrast, does not require that the work as a whole be sexually oriented or that it lack seriousness of purpose. Cf. *New York* v. *Ferber*, 458 U.S. 747, 764 (1982). The film *Schindler's List*, for example, would fall within the statutory prohibition if a 17-year-old actor or actress had been used in a particular sexually explicit

seem particularly appropriate to construe a statute to impose a scienter requirement with respect to such a legally dispositive fact. Compare *Liporata*, 471 U.S. at 426.

3. This interpretation of Section 2252 derives further support from the practical difficulties that would attend efforts by distributors or receivers to verify the ages of performers whose majority might be open to question. Unlike persons who produce the visual depictions covered by the statute, whose activities are covered by 18 U.S.C. 2251 and who may be subjected to criminal liability even if they lack knowledge that a model or performer is under 18,[13] distributors or receivers may lack practical means of reliably determining the ages of performers with whom they have no direct contact.[14] Indeed, under

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scene. See William Branigin, *Manila in Agony Over Schindler's Ecstasy*, Wash. Post, Mar. 8, 1994, at B1. The age of a single performer may thus differentiate prohibited child pornography from First Amendment protected materials.

[13] The legislative history makes clear Congress's intent that knowledge of a performer's minority is not required under Section 2251. See H.R. Rep. No. 696, 95th Cong., 1st Sess. 12 (1977) (hereinafter *1977 House Report*); S. Conf. Rep. No. 601, 95th Cong., 1st Sess. 5 (1977); H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977); pages 29, 33, *infra*; compare *Morissette*, 342 U.S. at 255, 260. In 18 U.S.C. 2257(b), Congress has imposed on the producer of materials containing depictions of sexually explicit conduct the duty to ascertain the birth date of each performer. No comparable duty is imposed on those who transport or distribute such materials.

[14] In *United States* v. *United States District Court for Central District of California*, 858 F.2d 534 (1988), the Ninth Circuit pointed out: "Those who arrange for minors to appear in sexually explicit materials are in a far different position from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape. While it would undoubtedly chill the

the construction of Section 2252 propounded by the Ninth Circuit in *Thomas*, the statute would presumably impose criminal penalties upon employees of common carriers who unwittingly assist in the transport or shipment of proscribed materials, since such persons "knowingly" perform the act of transporting or shipping. See *United States* v. *Gendron*, No. 92-2003 (1st Cir. Feb. 28, 1994), slip op. 7. That broad sweep of Section 2252, if it does not include a scienter requirement concerning the contents of the materials, weighs heavily against such a construction. *Ibid.*

C. The Legislative History Of 18 U.S.C. 2252 Affirmatively Indicates That Congress Did Not Intend To Dispense With A *Mens Rea* Requirement

The legislative history reinforces the indications in the text of 18 U.S.C. 2252 that scienter with respect to the minority of the child is an element of the offense.

1. a. Sections 2251 and 2252 of Title 18 were first enacted as part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (1978). That Act began its passage through Congress in the form of a number of bills employing different approaches to the problem. The principal formulation, in S. 1585, 95th Cong., 1st Sess. (1977), and H.R. 8059, 95th Cong., 1st Sess. (1977), was to add only Section 2251 to Title 18 in order to reach producers of child pornography. Other bills (including S. 1011, 95th Cong., 1st Sess. (1977), introduced by Senator Roth) proposed

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distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of actors with whom they have had no direct contact, producers are in a position to know or learn the ages of their employees." *Id.* at 543 n.6 (citation omitted).

adding a second provision, Section 2252, to Title 18 in order to reach distributors and recipients of child pornography.

On behalf of the Department of Justice, Assistant Attorney General Patricia M. Wald offered extensive comments regarding the provisions of S. 1011. See S. Rep. No. 438, 95th Cong., 1st Sess. 24-30 (1977) [hereinafter *1977 Senate Report*]. She noted that "the bill does not distinguish between material which is obscene and material which is protected by the First Amendment," and concluded that "[i]n the face of the strong constitutional protection accorded material which is not obscene, we cannot say with any certainty that the proposed legislation would withstand constitutional challenge." *Id.* at 27. She also recommended that

> the word "knowingly" in the second line of section 2251 is unnecessary and should be stricken. * * * Unless "knowingly" is deleted here, the bill might be subject to an interpretation requiring the Government to prove the defendant's knowledge of everything that follows "knowingly", including the age of the child. We assume that it is not the intention of the drafters to require the Government to prove that the defendant knew the child was under age sixteen but merely to prove that the child was, in fact, less than age sixteen.

Id. at 28-29.[15] She stated, however:

[15] Two witnesses who appeared before the Senate Judiciary Committee agreed that use of the word "knowingly" in Section 2251 would require proof that the defendant was aware that a performer or model was a minor. *Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 95, 106 (1977) [hereinafter *1977 Senate Hearings*].

> On the other hand, the use of the word "knowingly" in subsection 2252(a)(1) is appropriate to make it clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material they are transporting. To clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved.

Id. at 29. Finally, Assistant Attorney General Wald noted that "[t]o the extent that section 2252 deals with obscene material, the offenses are covered by existing Federal statutes. See 18 U.S.C. 1461-1465." *Id.* at 30.[16]

The views of the Department of Justice were developed further in testimony given by representatives of the Department during hearings in the Senate and House of Representatives. The Department's constitutional concerns extended to the production as well as the distribution of non-obscene materials portraying sexually explicit conduct on the part of minors. The Department took the position that the production of such materials was not constitutionally protected[17] and could

Unlike Assistant Attorney General Wald, however, those witnesses advocated retention of the knowledge requirement. *Ibid.* Senator Culver also appears to have understood the word "knowingly" in Section 2251 to require proof that the defendant knew that the child was a minor. See *id.* at 106.

[16] Deputy Assistant Attorney General Keeney submitted a similar analysis of legislative proposals pending before the House of Representatives. See *1977 House Report* 17-23.

[17] That proposition commanded general agreement among witnesses in the House and Senate hearings. A spokesperson for

be prosecuted by state authorities under existing child abuse statutes. *Sexual Exploitation of Children: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 312 (1977) [hereinafter *1977 House Hearings*]. The Department expressed doubt, however, regarding congressional power to proscribe such acts absent a nexus to interstate commerce. *Id.* at 314-315. And if the required nexus consisted of the subsequent distribution in interstate commerce of non-obscene materials, the Department feared, the legislation might be struck down as violative of the First Amendment. *Id.* at 315.[18] The Department therefore recommended that Congress

> amend the obscenity statutes to cover producers and manufacturers who manufacture this material with knowledge or reason to know that it will move in interstate commerce, and further amend the obscenity

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the American Civil Liberties Union, for example, stated (*1977 Senate Hearings* 97):

> [T]hose who directly cause and induce a minor to engage in a sexual act, or engage in it with a minor, are those who violate the laws; those who recruit and offer children for sexual acts clearly should be prosecuted. Indeed, the ACLU believes that even the activities of one who records the event of the sexual behavior, such as the photographer at the scene, can be found within the group of persons who have caused the act to occur. In contrast, those who have not participated in causing or engaging in the sexual activity but who may profit as a result of it, such as a publisher, editor, distributor or retailer, are not violating the law. While we may vigorously dislike and reject what they do, their activities in publishing and disseminating printed or visual materials are wholly protected by the First Amendment.

[18] The Department expressed the same concerns before a Senate subcommittee. See *1977 Senate Hearings* 86-87.

> statutes by providing a higher penalty when children are used in the sexual activities in the production of this material.

1977 Senate Hearings 85; see also *1977 House Hearings* 309.

b. The bill reported by the Senate Judiciary Committee incorporated some but not all of the Department's suggestions. Section 2252 was eliminated entirely from the bill. The Senate Report explained:

> The Committee has carefully considered the suggestion that the Federal laws be extended to make illegal the sale and distribution of materials whose production involved the use of minors in sexually explicit conduct as defined in Section 2251. The Committee recognizes, however, that the sale and distribution of such material cannot be approached in the same manner as its production. * * * [T]he Committee is of the view that an attempt to make illegal the sale and distribution of material regardless of whether such material when taken as a whole is obscene, would run counter to present Federal constitutional law as ennunciated [*sic*] by the Supreme Court in [*Miller* v. *California*, 413 U.S. 15 (1973)].

1977 Senate Report 17-18. Instead, the committee bill would have amended 18 U.S.C. 1461 ("Mailing obscene or crime-inciting matter"), 1462 ("Importation or transportation of obscene matters"), and 1465 ("Transportation of obscene matters for sale or distribution") to provide enhanced penalties if the proscribed materials "involved the use of any person under the age of 16 years engaging in sexually explicit conduct (as defined in

section 2251 of this Title)." *1977 Senate Report* 23, 24 (emphasis omitted).[19]

By contrast, Section 2251, as reported by the Senate Judiciary Committee, was not limited to the production of obscene materials. See *1977 Senate Report* 2 (text of bill).[20] The word "knowingly" was retained in Section 2251. The Senate Report stated that "[i]t is the Committee's intention that the use of the word 'knowingly' in both Sections 2251(a) and (b) will require that the person charged under these provisions have knowledge or reason to know the purpose for which the minor was being used in the production of the material in question." *1977 Senate Report* 15-16. The Report did not further elaborate upon the knowledge issue or specifically state whether knowledge of the performer's minority was to be an element of the offense.

c. The Senate Judiciary Committee's decision to eliminate Section 2252 sparked substantial controversy on the Senate floor. Senator Roth, while praising the committee bill as a whole, expressed the view that "the bill

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[19] Under the committee bill such violations would have been punishable by "a fine of not more than $10,000, or imprisonment of not less than one year nor more than ten years, or both, for the first offense, or a fine of not more than $15,000, or imprisonment of not less than two years nor more than fifteen years, or both, for each such offense thereafter." *1977 Senate Report* 23, 24 (emphasis omitted).

[20] The 1977 Senate Report (at 16) did, however, contain the following enigmatic statement: "Section 2251 may literally encompass isolated, individual acts involving the use of children in the production of sexually explicit materials. Section 2251 is not intended to reach all such isolated incidents, which often are more appropriately the subject of state or local concern. The Committee fully intends that federal prosecutors will wisely exercise their discretion to reach only those cases which are the proper subject of Federal concern."

has one serious shortcoming in that it fails to include a strong provision against the distributors and sellers of child pornography." 123 Cong. Rec. 33,047 (1977). He continued (*ibid.*):

> The bill does contain increased penalties for the distribution of child pornography that is deemed obscene under present obscenity statutes. In other words, in this crucial area of distribution, the bill does not offer a new law, but rather merely increases the penalties under existing law. Unfortunately, though, existing statutes have proven remarkably ineffective in eliminating child pornography.

Senator Roth accordingly introduced an amendment to the committee bill to provide (*ibid.*):

> (a) No person may—
>
> (1) knowingly transport, ship, or mail in interstate or foreign commerce for the purpose of sale or distribution for sale any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct; or
>
> (2) knowingly receive for the purpose of sale or distribution for sale, or knowingly sell or distribute for sale, any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct which has been transported, shipped, or mailed in interstate or foreign commerce.

Responding to the contention that a ban on the transportation or distribution of non-obscene materials would violate the First Amendment, Senator Roth stated that "[w]hile a challenge in the courts would appear certain, I

believe that this amendment's constitutionality could and would be upheld." *Id.* at 33,048. He noted that this Court had previously "identified an independent, 'transcending' interest of the State in the welfare of its children." *Ibid.*

A floor colloquy between Senators Roth and Percy addressed the significance of the word "knowingly" in the Roth amendment. Senator Percy expressed his understanding that to act "knowingly," "the distributor or seller must have either, first, actual knowledge that the materials do contain child pornographic depictions or, second, circumstances must be such that he should have had such actual knowledge, and that mere inadvertance [*sic*] or negligence would not alone be enough to render his actions unlawful." 123 Cong. Rec. 33,050 (1977). Senator Roth replied (*ibid.*):

> That is absolutely correct. This amendment, limited as it is by the phrase "knowingly," insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography and thereby are actively contributing to the maintenance of this form of child abuse are subject to prosecution under this amendment.

Senator Percy then asked whether a bookseller could be prosecuted under Section 2252 "if a book or magazine which happened to contain prohibited material is discovered in his shop." *Ibid.* Senator Roth responded that his amendment would "create[] no affirmative duty to inspect on the part of the distributor or seller, though it would certainly apply to one who actively and affirmatively endeavors to conceal his knowledge." *Ibid.*

The Roth amendment passed the Senate by a vote of 73-13. 123 Cong. Rec. 33,057 (1977). The bill as a whole then passed by a vote of 85-1. *Id.* at 33,060-33,061.

d. In the fall of 1977, the House of Representatives debated two distinct legislative proposals addressing the use of juveniles in sexually explicit photographs and films. The House first considered H.R. 6693, 95th Cong., 1st Sess. (1977), the Child Abuse Prevention and Treatment Amendments of 1977. Section 9 of that bill contained language very similar to the Roth amendment. See 123 Cong. Rec. 30,926, 30,927 (1977). Explaining the inclusion of the word "knowingly" in Section 9(a)(2) and (3) of the bill (which dealt with transportation, receipt, and sale of the proscribed materials), Representative Jeffords stated that "[w]e are talking about people knowing that it is the kind of stuff we are talking about, not knowing they are just transportating [*sic*] a piece of material. It is intended that they have knowledge of the type of material being transported, that it contains the type of material proscribed by this bill." 123 Cong. Rec. 30,935 (1977). He emphasized, in a point of particular relevance to the Ninth Circuit's constitutional concerns, that "[t]he legislative history should be clear on that so as to remove any chance it will lead into constitutional problems." *Ibid.* The bill passed the House by a vote of 375-12. *Id.* at 30,948-30,949.

Sixteen days later, the House Judiciary Committee reported H.R. 8059. That bill differed in significant respects both from H.R. 6693 and from the bill passed by the Senate. In H.R. 8059, the word "knowingly" was dropped from Section 2251. The committee report explained that the deletion had been made "at the suggestion of the Department of Justice. * * * It is not the intention of the committee to require the Government to prove the defendant knew the child was under age 16." H.R. Rep. No. 696, 95th Cong., 1st Sess. 12 (1977) [hereinafter *1977 House Report*]. The committee bill did not contain any version of Section

2252; nor did it contain any provision enhancing the penalties for shipment, transportation, or receipt of obscene materials depicting minors engaged in sexually explicit conduct. See *1977 House Report* 14-16 (text of bill). The House Report explained the committee's view that "there is no First Amendment question in providing for prosecution of persons who abuse children. However, once those photos and films are reduced to magazines, movies, etc., numerous court decisions including Supreme Court decisions, make clear that they are permissible under the First Amendment guarantee of free speech *unless* they are proven to be obscene." *Id.* at 7. The Committee also pointed out that many sellers and distributors of child pornography could be prosecuted under existing statutes, noting that "[w]e have viewed much of this material, and there seems little doubt that they [*sic*] would be found obscene under existing federal and state obscenity laws." *Ibid.*

The absence of a provision dealing with distribution offenses provoked considerable debate on the House floor. The committee bill was brought up under a motion to suspend the rules and thus was not subject to amendments. See 123 Cong. Rec. 34,992 (1977) (Rep. Conyers); *id.* at 34,997 (Rep. Rudd). The committee bill passed by a vote of 420-0. *Id.* at 35,024-35,025. After passage of the committee bill, however, Representative Ashbrook introduced a motion to direct the House conferees to agree to the Roth amendment. *Id.* at 35,030.[21] That motion passed by a vote of 358-54. *Id.* at 35,033-35,034.

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[21] In introducing his motion, Representative Ashbrook stressed the similarity between the Roth Amendment and Section 9 of H.R. 6693. 123 Cong. Rec. 35,030 (1977). Speaking in support of the motion, Representative Jeffords noted in the same vein that "[a]ll we are being asked to do here is to instruct the conferees to do something we have already done before by almost an overwhelming vote." *Id.* at 35,032.

e. Despite the broad support for the Roth amendment in both the Senate and the House of Representatives, the version of Section 2252 that emerged from the Conference Committee differed from Senator Roth's formulation. Section 2252(a) provided as follows:

> (a) Any person who—
>
> (1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—
>
> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual or print medium depicts such conduct; or
>
> (2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce, if—
>
> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual or print medium depicts such conduct;
>
> shall be punished as provided in subsection (b) of this section.

S. Conf. Rep. No. 601, 95th Cong., 1st Sess. 2 (1977) (emphasis omitted) [hereinafter *Senate Conference Report*]; H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 2 (1977) (emphasis omitted) [hereinafter *House Conference Report*]. The most significant change from the Roth amendment was the addition of the requirement that the "visual or print medium" be "obscene."[22] In *form*, the bill reported by the Conference Committee adopted Senator Roth's proposal by adding a new Section 2252 to Title 18 and creating a new offense. In substance, however, the Conference Committee's version of Section 2252 (like the bill previously reported by the Senate Judiciary Committee) operated as a sentencing enhancement provision: it increased the penalties for conduct that was already unlawful when that conduct involved the use of children in sexually explicit poses, but (due to the obscenity requirement) it did not prohibit any activity that was not already a violation of federal law.

In other respects as well, the version of Section 2252 reported by the Conference Committee departed from the language of the Roth amendment. The Conference Committee bill included the requirement that "the producing of such visual or print medium involve[] the use of a minor engaging in sexually explicit conduct," in addition to the requirement (incorporated from the Roth Amendment) that "such visual or print medium depict[] such conduct." Moreover, those two requirements were broken off into separate subclauses (A) and (B) introduced by the word "if," with the result that the word

[22] Representative Conyers subsequently explained that "[a] majority of the House conferees voted to accept the Roth amendment with the qualifying language that the printed or visual medium be obscene. The Senate receded and a compromise was struck." 124 Cong. Rec. 526 (1978).

"minor" might seem to be at greater remove from the word "knowingly." The Conference Report did not suggest, however, that those revisions were intended to have a bearing on the scienter issue.[23]

By contrast, the Conference Report explained that Section 2251 was revised for the specific purpose of eliminating a scienter requirement with respect to the age of the child:

> The Senate bill contains an express requirement in proposed section 2251(a) that the crime be committed "knowingly." The House amendment does not. The conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.

Senate Conference Report 5; *House Conference Report* 5. The Conference Committee's simultaneous retention of the word "knowingly" in Section 2252 indicates that it is an element of a prosecution under that provision that the defendant knew that the subject was a minor.

The bill reported by the Conference Committee was passed by the Senate on November 4, 1977, 123 Cong.

[23] The Conference Report is of little assistance in determining the intended reach of the word "knowingly" in Section 2252. The Report stated only that "[i]t is the intent of the conference committee that if a minor has engaged in this sexually explicit conduct and there was a production of material using any printed or visual medium depicting such conduct that persons who knowingly transport, ship, or mail for the purpose of sale or distribution, or knowingly thereafter receive for sale or distribution, or knowingly thereafter sell or distribute for sale any such material are liable whether or not they have contact with the minor or the original production of the material." *Senate Conference Report* 7; *House Conference Report* 7.

Rec. 37,136 (1977), and by the House on January 24, 1978, 124 Cong. Rec. 531 (1978).[24] It was signed into law by President Carter on February 6, 1978. 14 Weekly Comp. Pres. Doc. 279, 304 (Feb. 13, 1978). In light of the passage of that law, the provisions of H.R. 6693 dealing with child pornography were dropped from H.R. 6693 as ultimately enacted. See Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205; 124 Cong. Rec. 9306 (1978) (Rep. Jeffords).

2. On July 2, 1982, this Court rendered its decision in *New York* v. *Ferber*, 458 U.S. 747. The Court in *Ferber* held that the First Amendment does not prevent a State from prohibiting the dissemination of non-obscene materials whose production involves the participation of children under age sixteen in sexually explicit conduct. Under the rule announced by the Court, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be

[24] The Conference Committee's decision to add an obscenity requirement to Section 2252 provoked little debate during consideration of the Conference Report. Senator Roth acknowledged "mixed feelings regarding the conference report," 123 Cong. Rec. 37,135 (1977), but characterized the bill as "a major step in the right direction." *Id.* at 37,136. Representative Ashbrook expressed personal opposition to the obscenity requirement but stated that "in all fairness, we have about 90 percent of the Roth amendment." 124 Cong. Rec. 528 (1978). In a similar spirit, Representative Kildee stated that "[a]lthough I opposed the inclusion of the word 'obscene,' the majority of the conferees felt that it was necessary to meet any possible first amendment questions. The inclusion of the word 'obscene' did not alter the purpose of the legislation. All of the conferees agreed that the reason for this legislation was to protect children from a particularly vicious form of abuse." *Id.* at 529.

considered as a whole." 458 U.S. at 764. The Court noted, however, that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Id.* at 765.

In response to this Court's decision in *Ferber*, Congress in 1984 amended Section 2252 to eliminate the requirement that the proscribed materials be obscene. See Child Protection Act of 1984, Pub. L. No. 98-292, § 4(3), 98 Stat. 204.[25] Both the House and Senate reports noted that inclusion of the obscenity requirement in the original 1978 legislation had reflected Congress's perception that in the absence of such a requirement Section 2252 would have been of doubtful constitutionality. See H.R. Rep. No. 536, 98th Cong., 1st Sess. 1-2 (1983); S. Rep. No. 169, 98th Cong., 1st Sess. 7 (1983). "Because the Supreme Court ha[d] * * * settled the obscenity question, [the 1984 amendments] remove[d] the obscenity requirement from the distribution offense to maximize the protection Federal law can offer to the Nation's children." *Ibid.*[26] The legislative history of the 1984 amendments does not address the question whether a prosecution under Section 2252 requires proof that the

[25] The statute was amended in other respects as well. The 1984 amendments, *inter alia*, deleted the element of a commercial purpose under Section 2252; increased the potential fines under Sections 2251 and 2252; and raised the age at which models or performers would cease to be treated as minors under the statute from 16 to 18. See 98 Stat. 204-205.

[26] See also 129 Cong. Rec. 32,458 (1983) (Rep. Hughes); *id.* at 32,459 (Rep. Pashayan); *ibid.* (Rep. Sawyer); *id.* at 32,461 (Rep. Sensenbrenner); 130 Cong. Rec. 7197 (1984) (Sen. Specter); *id.* at 7198 (Sen. Grassley).

defendant was aware of the minority of a particular performer.[27]

3. The text and history of Section 2252, as enacted in 1978, are perhaps susceptible of two quite different interpretations regarding the scienter issue presented here. On the one hand, the presence of the word "knowingly" in Section 2252, as well as the other textual indicia noted above (see pages 18-21, *supra*), suggest that Congress intended to require knowledge of a performer's minority as an element of the offense. That reading is supported by Senator Roth's unequivocal statement that such knowledge would be required under the Roth amendment, and by Representative Jeffords' similar statement that a House provision patterned after the Roth Amendment was intended to reach persons who have knowledge that a shipment "contains the type of material proscribed by this bill." 123 Cong. Rec. 30,935

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[27] Section 2251 was amended in 1986 in minor respects not relevant here. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, §§ 2-3, 100 Stat. 3510. The House Report on the 1986 Amendments states that "[t]he government must prove that the defendant knew the character of the visual depictions as depicting a minor engaging in sexually explicit conduct but need not prove that the defendant actually knew the person depicted was in fact under 18 years of age or that the depictions violated Federal law." H.R. Rep. No. 910, 99th Cong., 2d Sess. 6 (1986). That statement, however, addresses amendments to Section 2251, and we do not believe that it sheds light on the proper construction of Section 2252.

In 1988, Section 2252 was further amended to prohibit transportation or shipment by computer. See Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. N, § 7511(b), 102 Stat. 4485. Section 2252 was further amended in 1990. See note 1, *supra*. Neither the text nor the legislative history of those amendments addresses the scienter issue in this case.

(1977). Despite the addition of an obscenity requirement, Members of both Houses characterized the version of Section 2252 reported by the Conference Committee as substantially similar to the Roth amendment. That interpretation of Section 2252 derives further support from the fact that the Conference Committee deleted the word "knowingly" from Section 2251 for the specific purpose of making clear that knowledge of a performer's minority is *not* an element of the offense of producing prohibited depictions.

On the other hand, it could be argued that Section 2252, as enacted in 1978, did not require knowledge of a performer's minority. Due to the addition of the obscenity requirement, the enactment of Section 2252 did not prohibit any conduct that was not already criminal; it simply had the effect of increasing the punishment for transportation and distribution of obscene materials the production of which involved the use of minors engaging in sexually explicit conduct. Imposition of enhanced penalties based on a fact of which the defendant was unaware would not be contrary to the presumption, outside the context of so-called "regulatory" or "public welfare" offenses, that criminal liability requires *mens rea*. See pages 15-16, *supra*. Moreover, the effect of the Conference Committee's revision of the Roth amendment to include the two requirements set off in subclauses (A) and (B) was to place the word "knowingly" in relatively close proximity to the word "obscene" but at somewhat greater remove from the word "minor." Section 2252, as originally enacted, might therefore have been read to incorporate the approach suggested by the Justice Department in 1977: a limitation of the distribution offense to obscene materials, with a requirement (mandated by *Hamling*) that the distributor have knowledge of the materials' (obscene) "nature and

character," but with no requirement that the distributor know that the performer was a minor. See *1977 Senate Report* 27, 29 (letter of Assistant Attorney General Wald); *1977 House Report* 20, 22 (statement of Deputy Assistant Attorney General Keeney). In contrast to the interpretation we urge, however, this interpretation is not supported by any affirmative statements in the legislative history.

For present purposes, however, the crucial point is this: under *either* view of Congress's intent in 1977-1978, there is *no* indication that Congress intended for Section 2252 to impose criminal liability in the complete absence of *mens rea* with respect to the nature of the materials. The 1984 amendments to Section 2252, by deleting the requirement that the proscribed materials be obscene, fundamentally altered the significance of a performer's minority. The minority of a particular performer no longer serves merely to increase the penalties for conduct that is independently unlawful. Rather, the minority of the performer now separates conduct that is legal—indeed, protected by the First Amendment—from conduct that is criminal. Speculation from mere silence that Congress in 1978 might plausibly have wished not to require knowledge of a fact that served only to enhance penalties surely provides no clear, affirmative indication that Section 2252 should be construed not to require proof of such knowledge now that the same fact furnishes the *basis* for criminal liability.

The conclusion that the intent to enact such a provision should not be attributed to Congress is buttressed by the 1977 colloquy between Senators Percy and Roth regarding the proper construction of the Roth amendment at a time when it did not include an obscenity requirement. Senator Roth was at that time the foremost congressional proponent of the view that Congress could

and should criminalize the distribution of non-obscene materials whose production involved the use of minors engaging in sexually explicit conduct. Senator Roth made clear, however, that his amendment would impose criminal liability only upon "those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography." 123 Cong. Rec. 33,050 (1977). This interpretation also is supported by the repeated expressions of concern in the legislative history leading up to enactment of Section 2252 in 1978 that measures to combat child pornography be fashioned in a manner that would render them constitutional. See pages 22-30, *supra*.

D. 18 U.S.C. 2252 Should Be Construed To Require Knowledge That The Production Of Particular Materials Involved The Use Of A Minor Engaging In Sexually Explicit Conduct

For the reasons stated above, we believe that 18 U.S.C. 2252 incorporates a scienter requirement and that the Ninth Circuit erred in construing it as a strict-liability provision. Two *amici*, while acknowledging that Section 2252 requires some form of scienter—and therefore does not apply to persons who are unfamiliar with the contents of proscribed materials—argue that proof of knowledge of a performer's minority is not essential. See National Family Legal Foundation *et al.* Amicus Br. Pet. Stage 11-12 ("standard would be met when * * * the defendant had knowledge * * * that [material] was sexually explicit and that the 'actors' and 'actresses' appeared youthful"); National Law Center for Children and Families *et al.* Amicus Br. Pet. Stage 5 ("Section 2252 should be interpreted to require scienter as to the sexually explicit nature of the materials distributed" but not

to "requir[e] scienter as to minority").[28] We disagree. In our view, to obtain a conviction under Section 2252, the government is required to prove that the defendant transported, shipped, distributed, received, sold, or possessed material that he knew depicted minors engaging in sexually explicit acts.[29]

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[28] The district court appears to have applied a similar standard when it reconsidered respondents' conviction on remand from the Ninth Circuit. In light of *Thomas*, the district court held that knowledge of a performer's minority was not required. It stated, however, that "[t]he government met its burden under the statute when it proved that [respondent Gottesman] had knowledge of the 'character and contents' of the material and that Mr. Gottesman was not a mere delivery person with no idea whether the package contained books or widgets." Pet. App. 35a.

[29] We wish, however, to make two points regarding the proper implementation of this knowledge requirement. First, the requirement that a defendant act "knowingly" entails no special limitations on the manner by which such knowledge may be established. Like other elements of a criminal offense, a defendant's state of mind may be proved by circumstantial as well as by direct evidence. See, *e.g.*, *United States* v. *Ocampo-Guarin*, 968 F.2d 1406, 1410 (1st Cir. 1992); *Mallette* v. *Scully*, 752 F.2d 26, 32 (2d Cir. 1984); *United States* v. *Beck*, 615 F.2d 441, 449 (7th Cir. 1980); *United States* v. *Hudson*, 717 F.2d 1211, 1213 (8th Cir. 1983). For example, the youthfulness of a particular performer will often be so apparent from the visual depictions themselves as to permit a judge or jury to conclude, on that basis alone, that any individual who viewed the materials must have possessed the requisite knowledge. Cf. *United States* v. *United States Gypsum Co.*, 438 U.S. at 446 (noting that "an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted"); *Cheek*, 498 U.S. at 203-204 (unreasonableness of defendant's purported opinions may cause the jury to conclude that they are not sincerely held). A judge or jury might also infer the requisite knowledge from other types of circumstantial evidence, such as the titles of proscribed materials and/or the manner in which they were packaged or advertised,

1. Section 2252 makes criminal the conduct of any person who "knowingly [transports, ships, receives, distributes, sells, or possesses] any visual depiction, if * * * (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." The word "knowingly" might plausibly be taken to apply to both the "use of a minor" and the presence of "sexually explicit conduct"; it might also plausibly be taken to apply to neither. But it would be grammatically strained to read it to modify only the latter. The construction advo-

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even if the defendant has not been shown to have viewed the depictions themselves. A Section 2252 defendant need not be shown to have had direct contact with the minor in question, nor must the defendant's knowledge of the performer's minority be manifested by express assertions of such awareness. Cf. *Smith* v. *California*, 361 U.S. at 154.

Second, "in common understanding one 'knows' facts of which he is less than absolutely certain. To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question." *United States* v. *Jewell*, 532 F.2d 697, 700 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). Accord *United States* v. *United States Gypsum Co.*, 438 U.S. at 445; American Law Institute, *Model Penal Code & Commentaries* § 2.02(7), at 227 (1985) (when "knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist"). A corollary to that rule is the well-established principle that a defendant acts "knowingly" when he "willfully blinds" himself to facts showing that he is dealing with proscribed materials. See, *e.g.*, *United States* v. *Picciandra*, 788 F.2d 39, 46-47 (1st Cir.), cert. denied, 479 U.S. 847 (1986); *United States* v. *Graham*, 739 F.2d 351, 352-353 (8th Cir. 1984) (per curiam); *United States* v. *Burns*, 683 F.2d 1056, 1059-1061 (7th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1173 (1983); *United States* v. *Jewell*, 532 F.2d at 700-703.

cated by *amici* is thus a most unlikely interpretation of the statutory text enacted by Congress. Nor is the position espoused by *amici* supported by other indicia of congressional intent.

2. The position of *amici* also is inconsistent with "background assumption[s] of our criminal law." *Liparota* v. *United States*, 471 U.S. at 426. In construing federal criminal statutes outside the context of regulatory or public welfare offenses, this Court has typically presumed that imposition of criminal liability requires knowledge of the fact that separates lawful from unlawful conduct. See, *e.g.*, *United States* v. *Bailey*, 444 U.S. at 408; *United States* v. *United States Gypsum Co.*, 438 U.S. at 444-445.[30] Distribution or receipt of non-obscene materials that include visual depictions of "sexually explicit conduct" as defined in 18 U.S.C. 2256(2) is not in itself unlawful. Rather, the minority of the performer

[30] In *United States* v. *Feola*, *supra*, for example, the Court held that in a prosecution under 18 U.S.C. 111 (1970) the government generally need not prove that the defendant was aware of his victim's status as a federal agent. The Court stated, however, that such knowledge would be relevant in "circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea*. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent." 420 U.S. at 686. Thus, knowledge that the victim was a federal agent may be relevant in some Section 111 prosecutions but not in others, depending on whether the victim's federal status is a fact that separates lawful from unlawful conduct.

involved is the fact that renders the act illegal.[31] Absent substantial evidence of contrary congressional intent, established canons of statutory construction support an interpretation of Section 2252 under which the defendant must have known that the performer who engaged in such conduct was a minor.

This Court's decision in *Hamling* v. *United States*, *supra*, does not suggest a different result. The Court there held that under both the First Amendment and 18 U.S.C. 1461 it is "sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." 418 U.S. at 123. The Court explained that the government was not required to "prove a defendant's knowledge of the legal status of the materials he distributes." *Id.* at 121. In an obscenity prosecution, a defendant who knows the contents of the materials in question knows all the facts that are relevant to the verdict of the judge or jury; extrinsic evidence regarding the circumstances under which visual depictions were produced simply does not bear on the question whether they are obscene. *Hamling* is thus consistent with the general rule governing criminal prosecutions: the government must prove that the defendant knew the facts that rendered his conduct

[31] Nor does the youthful appearance of the performers render the distribution or receipt of such materials unlawful. The Court in *Ferber* noted that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." 458 U.S. at 763. Of course, a judge or juror may infer from the appearance of the performer, alone or in combination with other evidence, that the performer was in fact under 18 years of age at the time the materials were produced. The legally dispositive fact, however, is the actual rather than the apparent age of the performer.

illegal, but it need not establish the defendant's awareness of the applicable law. See *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 563-565 (1971). Materials proscribed by Section 2252 are characterized not simply by their depiction of sexually explicit conduct, but by the minority of the performer depicted therein. As the district court stated in its initial opinion in this case, "to know the nature and character of child pornography, almost by definition, one must know that it depicts children." Pet. App. 41a.[32]

3. Finally, Section 2252 as construed by *amici* would raise serious First Amendment concerns. As a practical matter, distributors and receivers of films or magazines often may not be able to verify with assurance the age of a particular performer. See pages 20-21 & note 14, *supra*. Yet such persons would be subject to the possibility of severe criminal penalties based solely on their awareness that the materials in question depict sexually explicit conduct—depictions that may be constitutionally protected if no performer is a minor. This Court should be reluctant "to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence

[32] Contrary to the contention of *amici* National Family Legal Foundation *et al.* (see Br. Pet. Stage 13-14), our construction of the statute preserves the distinction between knowledge of facts and knowledge of the law. A Section 2252 defendant who knows that a film depicts a 17-year-old performer engaging in simulated sexual intercourse may be prosecuted for distributing it, even if he is unaware that the federal statute exists, erroneously believes that the age of 16 years remains the statutory cutoff, or does not know that simulated as well as actual sexual conduct is covered by the Act.

that it courted those perils." *Public Citzen* v. *United States Department of Justice*, 491 U.S. at 466.[33]

II. RESPONDENTS' CONVICTIONS SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT FOUND THAT THEY HAD KNOWLEDGE THAT THE PERSON DEPICTED IN THE FILMS WAS A MINOR

Properly construed to require knowledge that materials depict a minor engaging in sexually explicit conduct, 18 U.S.C. 2252 is clearly constitutional. Because respondents were tried and convicted based upon that construction of the statute, their convictions should have been affirmed. In particular, Judge Kozinski was simply incorrect in his assertion that respondents were "tried under a theory which imposed strict liability as to the age of the minor." Pet. App. 17a n.*. To the contrary, the district court initially held that "the Government was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age," *id.* at 41a ¶2, and found as fact that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." *Id.* at

[33] The principle that statutes should if possible be construed so as to avoid unnecessary constitutional difficulties would not, we acknowledge, prevent the Court from fashioning a middle ground. Section 2252 might (for example) be construed to require knowledge of the sexually explicit character of the materials and "recklessness" as to the minority of the performer. See *Osborne* v. *Ohio*, 495 U.S. 103, 113 n.9, 115 (1990); Pet. App. 27a-28a & n.8 (Kozinski, J., dissenting). *Osborne* strongly indicates that such a statute would be constitutional. We nevertheless believe, based on the presence of the word "knowingly" in the statute and the legislative history referring to knowledge, that Section 2252 is best read to require knowledge of a performer's minority.

39a ¶7. See also J.A. 111-113, 138. Although the district court on remand amended its original conclusions of law in light of the Ninth Circuit's decision in *Thomas*, see Pet. App. 36a, it did not retract its earlier finding of fact, which was amply supported by the record.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1994

APPENDIX

Statutory Provisions

18 U.S.C.:

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or

publishes, or causes to be made, printed or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported in interstate or foreign commerce by any means including by computer or mailed.

(d) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of

this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using [materials] which have been mailed or so shipped or transported, by any means, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen years.

(2) Whoever violates paragraph (4) of subsection (a) shall be fined under this title or imprisoned for not more than five years, or both.

* * * * *

§ 2256. Definition for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape;

(6) "computer" has the meaning given that term in section 1030 of this title; and

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.